A **CHRISTOPHER MICHAEL CHEOW**

v.

ANS BUILDERS SDN BHD

B HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[WINDING-UP PETITION NO: 28NCC-933-10-2011]
26 MARCH 2012

C ***COMPANIES AND CORPORATIONS:*** *Winding up - Opposition to petition - Whether statutory presumption of company's inability to pay debt rebutted - Whether there was bona fide dispute as to petitioner's debt - Whether petitioner in a position of 'creditor' - Whether petitioner had locus to present winding-up petition - Whether petition abuse of court's* D *process - Companies Act 1965, s. 218(2)(a)*

The petitioner entered into a joint-venture with the respondent to bid for two projects. A new company was incorporated to undertake the job. Midway through the project, the petitioner E wanted to withdraw from the joint-venture. It was agreed that the respondent shall buy over all the shares held by the petitioner for a sum of RM357,000. The respondent claimed that subsequent to this, it was agreed that the petitioner shall buy over 300,000 shares in the respondent company from one shareholder by the F name of Mr. Chin and that the RM357,000 due and owing by the respondent to the petitioner shall be assigned to Mr Chin. The petitioner claimed that the sale of shares by Mr Chin to him was mutually aborted and that he did not receive the shares in the respondent company from the said Mr Chin. Hence, the G plaintiff's solicitors issued a s. 218 notice under the Companies Act 1965 ("the Act") to the respondent, demanding payment of the sum of RM657,000. The petitioner later filed the present winding-up petition. In turn, the respondent applied to strike out the petition under O. 18 r. 19(1)(d) of the Rules of the High Court 1980 ('RHC'). H

Held (dismissing petition with costs):

(1) A winding-up petition on ground of inability of the respondent to pay its debts is totally unsuitable and indeed is an abuse I of the court's process where the debt is *bona fide* being disputed. Where the debt is being disputed and on substantial grounds then the petitioner is not a creditor within the

meaning of s. 218(2)(a) of the Act and thus has no capacity to present a winding-up petition; *Ng Ah Kway v. Tai Kit Enterprise Sdn Bhd* (refd); *NKM Development Sdn Bhd v. Irex Sdn Bhd* (refd). (paras 13 & 14)

(2) The sum total of the different possible versions as to the debt owing from the respondent to the petitioner was such that the debt claimed could not be said to be a *bona fide* debt. The dispute was on substantial ground and no less aggravated by the fact that it arose out of a joint-venture that had gone sour. (para 21)

(3) All that s. 218(2)(a) of the Companies Act 1965 affords is a rebuttable presumption as to inability to pay its debts when after the lapse of three weeks after the service of the notice the respondent company is not able pay the sum demanded or secure or compound for it to the reasonable satisfaction of the creditor. In order to rebut the presumption, the respondent was required to prove on a balance of probabilities that there is a *bona fide* dispute on the sum claimed or that the respondent is able to pay its debt; *Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd* (refd). (para 24)

(4) The case of *Malaysia Air Charter Co Sdn Bhd v. Petronas Dagangan Sdn Bhd* is not license for the proposition that so long as the undisputed debt exceeds RM500 and the balance was disputed, the petitioner could still proceed to present a winding-up petition. If substantially the debt is not disputed then only may a winding-up order be made. (para 30)

(5) The respondent had rebutted the statutory presumption of its inability to pay the debt as the debt to begin with was being disputed and on substantial grounds. The petitioner did not therefore stand in the position of a 'creditor' that had the locus to present a winding-up petition against the respondent. (para 33)

Case(s) referred to:

BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd [2001] 1 CLJ 591 HC ***(refd)***

Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd [2000] 4 CLJ 437 FC ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***

A *Mascon Sdn Bhd v. Kasawa (M) Sdn Bhd [2000] 1 LNS 203 HC* ***(dist)***
Ng Ah Kway v. Tai Kit Enterprise Sdn Bhd [1984] 1 LNS 164 HC ***(refd)***
NKM Development Sdn Bhd v. Irex Sdn Bhd [1988] 1 CLJ 65; [1988] 2 CLJ (Rep) 56 HC ***(refd)***
Sakuragawa Pump (S) Pte Ltd v. Perkapalan Mesra Sdn Bhd [2007] 1 LNS 417 HC ***(dist)***
B *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC* ***(refd)***
YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd [1996] 3 CLJ 51 CA ***(refd)***

C **Legislation referred to:**
Companies Act 1965, ss. 218, 218(1)(e), (2)(a)
Rules of the High Court 1980, O. 18 r. 19, O. 18 r. 19(1)(d)

For the petitioner - Nora Hayati (Mohd Azlan with her); M/s Nora Hayati & Assoc
D *For the respondent - H L Lee (Tania Scivetti with him); M/s H L Lee & Co*

Reported by Amutha Suppayah

E **JUDGMENT**

Lee Swee Seng JC:

[1] A winding-up petition may be presented against a company on ground of its inability to pay its debt. It is a powerful weapon
F utilised to put pressure on the company to pay what is said by the petitioner to be a debt due and owing to it. The consequences are severe as winding-up commences the moment a petition for it is presented against a respondent company. Consequences range from the respondent's bank freezing its account unless sufficient
G security is furnished for fear of preferential payments in the event the respondent is finally wound up. What is worse the bank may declare the respondent to be in default and recall its facilities from the respondent. Companies like the respondent in the construction business might be barred from tendering for projects as news of a
H winding-up petition being presented against it would be known from the gazette and advertisement of the petition. Debtors upon knowing of a winding-up petition being presented against its creditor might delay payment. Any application by the respondent for further credit facilities would most probably be denied.

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[2] In this case the petitioner has presented a winding-up petition against the respondent company for what is said to be a sum owing to it which cannot be disputed. Meanwhile the respondent has filed an application to strike out the petition.

Parties

[3] The petitioner was interested in entering into a joint-venture with the respondent to bid for two projects. Amongst the terms of the joint-venture are that a new company would be incorporated to undertake the job if awarded and that a sum of RM100,000 would be paid as a commitment fees for each project. Pending incorporation of the new company, all payments received by the respondent would be received for and on behalf of the new company.

[4] Konsep Setia Sdn Bhd was incorporated as the new company to handle one of the projects awarded.

Problem

[5] As the project was being carried out, around midway, the petitioner wanted to withdraw from the joint-venture. It was agreed that the respondent shall buy over all the shares held by the petitioner for a sum of RM357,000 for all the advances and injection of funds into the joint-venture company.

[6] According to the respondent, subsequent to the agreement reached on the sale of the shares in Konsep Setia Sdn Bhd, it was agreed that the petitioner shall buy over 300,000 shares in the respondent company from one shareholder by the name of Mr Chin Kok Peng and that the RM357,000 due and owing by the respondent to the petitioner shall be assigned to Mr Chin.

[7] The petitioner's version was that the sale of shares by Mr Chin to him was mutually aborted and that he did not receive the shares in the respondent company from the said Mr Chin. The petitioner also made reference to the fact that the shares transfer form (Form 32A) exhibited by the respondent in opposing the petition in exh. NSW5 was neither stamped nor attested, let alone perfected.

[8] The plaintiff through his solicitors issued a s. 218 notice under the Companies Act 1965 to the respondent demanding payment of the sum of RM657,000 within three weeks from the service of the notice, failing which the respondent shall be deemed to be unable to pay its debt and appropriate action shall be taken to wind-up the respondent.

Prayers

[9] At the expiry of the three weeks the petitioner filed a winding-up petition in the Kuala Lumpur High Court Winding-Up Petition No. 28NCC-611-2011 (the 1st petition) against the respondent on 26 July 2011. On 10 August 2011 the respondent filed a writ action in KLHC No. 22NCC-1312-2011 ("the writ action") against the petitioner and CIMB Bank Berhad claiming *inter alia* for the following:

(1) A declaration that the 218 Notice served on the respondent by the solicitors for the petition is defective;

(2) A declaration that the winding-up proceedings against the respondent is an abuse of the court's process;

(3) An injunction that the petitioner and/or his agents and/or his servants be restrained from doing or taking further steps in the 1st petition until the petitioner should get a final judgment in relation to the amount claimed or until the disposal of the writ action.

[10] The respondent obtained an *ex-parte* injunction on 19 August 2011 and on 14 October 2011 the injunction was granted *inter-parte* restraining the petitioner from taking any steps in 1st winding-up petition until the disposal of the writ action. The trial of the writ action was fixed on 3 January 2012 and 5 January 2012. The petitioner subsequently withdrew the winding-up petition with liberty to file afresh.

[11] The petitioner then applied successfully for the writ action of the respondent to be struck out on ground that the 1st petition had been withdrawn.

[12] This current petition is the 2nd petition filed on 31 October 2011 and based on the same s. 218 notice under the Companies Act 1965. On 9 January 2012 the respondent filed an application under O. 18 r. 19(1)(d) of the Rules of the High Court (RHC) 1980 to strike out the petition.

Principles

[13] It is a fundamental principle enunciated by the courts that a winding-up petition on ground of inability of the respondent to pay its debts is totally unsuitable and indeed is an abuse of the court's process where the debt is *bona fide* being disputed. Where the debt is being disputed and on substantial grounds then the petitioner is not a creditor within the meaning of s. 218(2)(a) of the Companies Act 1965 ("the Act") and thus has no capacity to present a winding-up petition.

[14] In *Ng Ah Kway v. Tai Kit Enterprise Sdn Bhd* [1984] 1 LNS 164 HC, Shankar J (as he then was) held that a petition to wind-up a company is a serious matter as it affects the reputation of the company. The debt must be liquidated and undisputed. The petition cannot be resorted to to settle disputed debts. The proper course for the petitioner is to file a civil suit for determining the disputed claims.

[15] The same sentiment and stricture was expressed by VC George J (as he then was) in *NKM Development Sdn Bhd v. Irex Sdn Bhd* [1988] 1 CLJ 65; [1988] 2 CLJ (Rep) 56 HC, at p. 59 as follows:

> I was more than satisfied that the alleged debt on which the petition was founded was disputed and on substantial grounds. I was of the opinion that the petition must fail for the same reasons that Megarry J gave for coming to a similar conclusion in the case of *Re Lympne Investments Ltd.* [1972] 2 All ER 385 where he said on p. 388 line i:
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> > It therefore seems to me that this petition must fail. A real dispute, turning to a substantial extent on disputed questions of fact which require *viva voce* evidence, and involving charges of fraud or near fraud, cannot properly be decided on petition. Nor is it right, or in accordance with the modern practice, to stand over the petition in order that the disputed issues may be resolved in other proceedings. That practice, I may say, seems to stem from *Re London & Paris Banking Corpn*. The companies court must not be used as a debt-collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding-up petition against it are such that it would be wrong to allow the machinery designed for such petitions to be used as a

A means of resolving disputes which ought to be settled in ordinary litigation, or to be kept in suspense over the company's head while that litigation is fought out. Further, *Mann v. Goldstein*, cited with approval in the New Zealand Court of Appeal in *Bateman Television Ltd v. Coleridge Finance Co. Ltd.*, provides authority for saying that when a B petition is based on a debt which is disputed on substantial grounds, the petitioner is not a 'creditor' within s. 224(1) of the Companies Act 1948 who has the *locus standi* requisite for the presentation of the petition, even if the company is in fact insolvent. Again, the existence of a C dispute on substantial grounds as to the existence of any debt defeats the contention that *lympne* has, within the meaning of s. 223(a), 'neglected' to pay the sum required by the statutory notice: see *Re London & Paris Banking Corpn*. In the context of a notice requiring a person to do D some act, I do not see how it can be said that the person 'neglects' to do that act if the reason for not doing it is a genuine and strenuous contention, based on substantial grounds, that the person is not liable to do the act at all. If there is liability, a failure to discharge that liability may well be 'neglect' whether it is due to inadvertence or E obstinacy or dilatoriness; but a challenge to liability is a challenge to the foundation on which any contention of 'neglect' in relation to an obligation must rest. All these considerations point in the same direction, and accordingly I dismiss the petition.

F **[16]** As to the meaning of "*bona fide* dispute" His Lordship Jeffrey Tan J (as he then was) in *BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd* [2001] 1 CLJ 591 HC at pp. 595-596 had succinctly summarised it as follows:

G ... For whether or not there is a *bona fide* dispute wholly depends upon the evidence (see *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 CLJ 424; [1988] 1 CLJ 5 (Rep) SC. "The debt must be disputed on some substantial grounds" (*Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 260; [1991] 1 CLJ (Rep) 317 SC, 97 per H Hashim Yeop A Sani CJ). The facts must indicate that there is a substantial dispute (*Sun Soon Heng Coach Works Sdn Bhd v. Re Nima Travel Sdn Bhd* [1984] 1 LNS 162 HC). "... it is not sufficient ... to say 'we dispute the claim'. (The respondent) must bring forward a *prima facie* case which satisfies the court that I there is something to be tried, either before the court itself, or in

an action, or by some other proceeding" (*Re Great Britain Mutual Life Assurance Society* [1880] 16 Ch D 246, 253 per Jessel MR). "Dispute means not just differences arising out of a party's refusal to do something but controversy over contestable matters. Mere refusal to pay is not a dispute. See the cases of *Elf Petroleum SE Asia Pte Ltd v. Winelf Petroleum Sdn Bhd* [1984] 1 LNS 166 HC, and *KSM Insurance v. Ong Ah Ba & Anor* [1984] 1 LNS 147 HC, both decisions by George J, (as he then was)" (*Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mills Sdn Bhd* [1991] 3 CLJ 2400; [1991] 1 CLJ (Rep) 362 SC, per Hashim Yeop A Sani CJ, and cited in *Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat T/A Juta Bena* [1996] 1 CLJ 231, 236 FC). "The dispute must be *bona fide* in both a subjective and objective sense. Thus it must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous and which the court should therefore ignore" (*Palmer's Company Law,* 23th edn. p. 1117; see also *Salak Park Development Sdn Bhd v. Fajar Menyensing Sdn Bhd* [1994] 4 CLJ 580 HC). To just say "we dispute the claim", is most definitely not enough.

But "where there is a *bona fide* dispute as to the debt, the company cannot be said to have neglected to pay on a statutory notice" (*Palmer's Company Law,* 23th edn. p. 1117), and a petition based on a debt which is disputed on substantial grounds will fail (see *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & 5 Ors and Another Application* [1994] 1 LNS 73 HC).

[17] The fact that there is a *bona fide* dispute on the debt can be seen even in the three different versions presented by the petitioner. First, there was the amount of RM657,000 claimed in the s. 218 notice and in the 1st petition. The 1st petition was withdrawn. Second, in the current petition which is the 2nd petition, the amount claimed is now RM557,000 which is certainly less by RM100,000 not because of any generosity on the part of the petitioner but more realisation that it would be difficult to sustain the argument that the sum which is undisputed is RM657,000. Third, the sum of RM200,000 paid which now the petitioner is claiming back from the respondent was paid by Site Vision Sdn Bhd as stated in the defence filed by the petitioner in the writ action and as exhibited in exh. CMC 3(a) in the affidavit in opposition of the petitioner in the writ action; Site Vision Sdn Bhd being the party that had entered into a Memorandum of Understanding (MOU) with the respondent. The "Payment Voucher" exhibited are clearly that of Site Vision Sdn Bhd for the payment to the respondent of the sum of RM100,000 at least.

[18] Then there is the respondent's version which is that the sum of RM357,000 being the amount owing to the petitioner from the sale of the petitioner's shares in Konsep Setia Sdn Bhd to the respondent has now been assigned to Mr Chin as the petitioner had agreed to purchase the shares of Mr Chin in the respondent company. There is evidence of the share transfer form that had been duly signed by Mr Chin and as pointed out by the respondent, Mr Chin is not complaining that he has not been paid by the respondent.

[19] Indeed Mr Chin in his affidavit affirmed on 26 January 2012 and filed herein said:

(4) I confirmed that I have executed the transfer form to effect transfer of my 300,000 ordinary shares in the respondent to the petitioner. The said transfer form has been handed to the company secretary.

(5) As far as I am concerned, the sale and purchase of my shares in the respondent company to the petitioner is completed and I have, as at the date hereof, not received any notice to the contrary, written or verbal, from the petitioner.

[20] Whether or not the sale of the shares from Mr Chin to the petitioner has been aborted is a matter that can only be determined after a trial of the matter. Likewise too the argument of the petitioner that the assignment of debt from the petitioner to Mr Chin is not a valid assignment.

[21] The sum total of the different possible versions as to the debt owing from the respondent to the petitioner is such that the debt claimed cannot be said to be a *bona fide* debt. Indeed the dispute is on substantial ground and no less aggravated by the fact that it arises out of a joint-venture that had gone sour with parties having now a different treatment on the advancement made by the petitioner as to whether it is commitment fee and whether it goes towards the purchase price of the shares or is different and distinct from the purchase price.

[22] Little wonder that the respondent had filed an application to strike out the petition under O. 18 r. 19 of the RHC. I am aware of the strong rebuke issued by His Lordship Abdul Hamid Mohammad JCA (as the retired Chief Justice then was) in *Maril-*

Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd and other appeals [2001] 3 CLJ 248 CA, where in the headnotes at p. 188 is summarised as follows:

> It is timely that the court come out strongly against the unhealthy trend in the way winding up petition are often conducted. Instead of defending the petition proper at the hearing of the petition, the respondent makes all kinds of interlocutory applications that would invariably stall the hearing of the petition proper. Such practice is unfair to the petitioners and clogging the court docket.

[23] In this case this court has avoided any stalling of the hearing of the petition as the court having been made aware on 18 January 2012 that there was an application to strike out the petition filed by the respondent, proceeded to fix 30 January 2012 for the hearing of the petition. On the day of hearing of the petition, the court proceeded to hear the petition on its merit as should the court dismiss the petition, then the application would be academic and should the court allow the petition then the application would be correspondingly dismissed. Indeed the arguments of the respondent in opposing the petition are the same as that in support of the application by the respondent in striking out the petition under O. 18 r. 19(1)(d) of the RHC. Further, the respondent had adopted wholesale its affidavit in opposition to the petition as its affidavit in support of the application to strike out the petition.

[24] All that s. 218(2)(a) of the Companies Act affords is a rebuttable presumption as to inability to pay its debts when after the lapse of three weeks after the service of the notice the respondent company is not able pay the sum demanded or secure or compound for it to the reasonable satisfaction of the creditor. In order to rebut the presumption, the respondent is required to prove on a balance of probabilities that there is a *bona fide* dispute on the sum claimed or that the respondent is able to pay its debt. See the Supreme Court's decision in *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC.

[25] Here the respondent has shown *via* its affidavit filed in support that there is a *bona fide* dispute on the debt. The procedure prescribed for winding-up by means of a petition is of course wholly unsuitable where the debt is in dispute. On a

conflict of affidavit evidence this court is not in a position to say which of the two versions is more plausible or probable save that it is unsafe to have the respondent company wound up on a disputed debt. Were it not so, the respondent companies would always be at the mercy of mercenaries whose method of bringing a respondent company to its knee would be to threaten to wind it up should it refuse to pay what is ostensibly a disputed debt, maligning its good name in the process.

[26] If the petitioner is so confident that there is no *bona fide* dispute on the debt, he is always free to pursue a summary judgment application in a writ action and then obtain judgment after which he would stand solidly as a creditor with the locus to present a winding-up petition.

[27] To bolster his position to present a winding-up petition, the petitioner through his counsel has cited to this court cases that according to his counsel, reiterate the position that so long as the debt not in dispute exceeds RM500, it does not matter if the balance is being disputed. The Federal Court case of *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd* [2000] 4 CLJ 437 FC was cited in support of that proposition of law. That I must say is a gross over-simplification of the cases. In *Malaysia Air Charter*, a judgment in default of appearance had already been obtained by the petitioner against the respondent. The statutory notice on the company to be wound-up had stipulated the judgment together with interest at 8% per annum from a certain date until the date of realisation. It was argued that the demand under s. 218(2)(a) required 'the sum so due' to be clearly specified and quantified and that no sum whatsoever ought to be left to be calculated or ascertained by the recipient of the notice. Failure to do so would result in the statutory notice being invalid. It was also argued that the sum demanded was in excess of what was actually due, and therefore the notice was invalid and did not raise the presumption under the said section. The Court of Appeal, in dismissing the appeal, held that the failure to quantify the actual sum due in the s. 218 notice did not render the demand invalid, and on the facts, the sum demanded in the respondent's notice was not excessive.

[28] It was in that context that leave was granted to refer two questions of law for the Federal Court's decision:

(a) Whether s. 218(2)(a) of the Act is to be interpreted literally and strictly or widely and liberally. A

(b) In the event, it is the literal and strict interpretation that ought to be adopted whether the s. 218 notice must quantify and specify the exact and actual sum due as at the date of the demand and leave no further sums/amounts to be calculated/quantified or ascertained by the recipient of the notice. B

[29] At pp. 667-669 of the judgment His Lordship Mohamed Dzaiddin FCJ (as the former CJ then was) had observed: C

After analysing the authorities, we would prefer the reasoning and conclusion of the full court of Victoria in *Re Fabo* that the court should adopt a liberal interpretation when considering the provisions of s. 218(2)(a) of the Act. We have earlier set out the reasons of the full court for adopting a liberal interpretation and their considerations that the adoption of a literal interpretation would be difficult. We would reiterate here that we agree with *Re Fabo* that a literal interpretation of the section would compel the court not to make a winding-up order notwithstanding the existence of clear evidence that an undisputed sum due exceeding RM500 has remained unpaid after a demand made without any reasonable explanation for the failure to pay. In the instant case, the statutory demand required the appellant to pay the respondent the judgment sum of RM334,118.79 together with interest at 8% p.a. etc, as at the date of the notice. From the evidence, the aforesaid sum remained unpaid. *Thus, if we were to interpret the section literally or strictly, it means no winding-up order could be made as the exact amount due as at the date of the notice has not been quantified, notwithstanding that the debt exceeded RM500 and remained unpaid. By contrast, the liberal interpretation would permit the court, if proved to its satisfaction, to make a winding-up order.* D E F G

Secondly, we agree with *Re Fabo* that commercial reality demands that 'preference be given to an interpretation that will remove from unmeritorious respondents the temptation to undertake an investigation into the exactness of the debt claimed to be owing on the relevant date in cases where complicated accounts or running accounts with daily adjustments may render probable the risk of some small errors having been made in the course of ascertaining with precision the extent of the debt. Indeed, the possibility exists that a contrary interpretation might lead to the absurdity that an understatement of the debt in the notice would prevent the making of an order where to do so was clearly H I

appropriate'. It is necessary to consider the factual situation presented in this appeal for the unreality of the literal approach to become evident. Here, the appellant was required to pay the respondent the judgment sum of RM334,118.79 together with interest thereon at the rate of 8% p.a. on all outstanding sums from 28 October 1988 until the date of realization. *By taking the literal interpretation approach, the respondent is required to undertake an exercise in calculating the exact sum due as at the date of the notice when on the face of the notice the sum due is more than RM500 and the appellant has been shown as deemed to be unable to pay its debts.*

Conclusion

For the above reasons, our answer to the two questions posed in the appeal is that s. 218(2)(a) of the Act should be liberally interpreted. A notice of demand under the subsection need not specify the exact sum due as at the date of the demand. *So long as the sum due exceeds RM500 and remained unpaid after a demand had been made without any reasonable explanation to the satisfaction of the court, there is therefore neglect to pay such sum within the meaning of the section*. It should however be borne in mind that s. 218(2)(a) does not create separate grounds for winding-up, but provides a mode of proof available in aid of an application seeking a winding-up on the ground specified in s. 218(1), *viz*, that the company is unable to pay its debts (*Ataxtin*). A company will not be wound up, even if it fails to heed a valid notice, if it can establish by independent evidence that it is solvent (*Re Fabo*).

In adopting the *Re Fabo* approach to the interpretation of s. 218(2)(a) of the Act, we have therefore differed from the High Court decision of *Re Perusahaan Jenwatt* which followed *Processed Sand*'s case. The Supreme Court in *Sri Hartamas*'s case likewise adopted a literal interpretation in dealing with the question whether under s. 218(2)(a), a company was entitled to have three weeks after service of the notice of demand to either pay, secure or compound the sum demanded. The court also took the opportunity to agree with *Re Perusahaan Jenwatt* that a demand did not fall within s. 218(2)(a) if the amount demanded exceeded the sum actually due. With respect, we consider this passage in the judgment of Gunn Chit Tuan SCJ *obiter* because the claim of the excess sum in the notice was never an issue before the court. In fact, the amount stated in the notice was not in dispute. Lastly, returning to the instant case under appeal, it is worth noting that the Court of Appeal found that the facts therein are on all fours with the facts in *Sri Hartamas*'s case. The Court of Appeal followed *Sri Hartamas*'s case, on the basis of *stare decisis*, which

in effect held that although the statutory notice did not quantify the interest due, it was still a good and valid notice. The Court of Appeal did not make any specific finding whether s. 218(2)(a) is to be interpreted literally as in *Re Perusahaan Jenwatt* or liberally, although its conclusion appears to be based on a liberal interpretation of the subsection. In the circumstances, we agree with the conclusion of the Court of Appeal but for different reasons. Accordingly, we dismiss this appeal with costs and order the appellant be wound up. Deposit to the respondent to account of taxed costs. (emphasis added)

[30] It is thus clear that the case of *Malaysia Air Charter* is not license for the proposition that so long as the undisputed debt exceeds RM500 and the balance is disputed, the petitioner can still proceed to present a winding-up petition. It is only when the debt exceeds RM500 and remains unpaid after a demand made without reasonable explanation to the satisfaction of the court that there is then a neglect to pay within the meaning of s. 218(2)(a) of the Companies Act. In other words if substantially the debt is not disputed then only may a winding-up order be made. Thus where the issue is over the amount of interest payable under a judgment debt as in the Court of Appeal case of *YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd)* [1996] 3 CLJ 51 CA it was held under the headnotes as follows at p. 60:

(2) Even if the notice over-stated the amount owing, it is legitimate look at the circumstances in order to determine the critical issue upon which the application depends, namely whether or not the company is unable to pay its debts. In this appeal, the notice of demand showed that the total principal amount owing far exceeded the quantum of RM500. The court was therefore of the view that the points raised could not be sustained.

[31] The case of *Mascon Sdn Bhd v. Kasawa (M) Sdn Bhd* [2000] 1 LNS 203 HC, can be distinguished in that case there was no *bona fide* dispute as to the amount claimed. Hid Lordship Abdul Hamid Mohamad J (as the former CJ then was) clearly analysed the facts and applied the law as follows at p. 846:

The next issue is whether there is a *bona fide* dispute of the sum claimed. The amount is the total amount contained in the interim certificates nos 1-17 issued by the respondent's architect. In *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical*

Centre Sdn Bhd [1995] 2 CLJ 345 SC, at p. 81 the Supreme Court quoted with approval from the book *Building Contracts* (4th edn) by the Donald Keating at p. 279 that **a certificate by a defendants' (in that case) architect or engineer is 'a special and formal kind of admission'**

Augustine Paul JC (as he then was) in *Usahabina v. Anuar Yahya* [1998] 2 CLJ (Supp) 131 at p. 158 said:

> The law that I have adverted to makes it clear that if the defendant wished to dispute the amounts stated in the two certificates he ought to have asked the architect to make appropriate adjustments in another certificate or take the dispute to arbitration both of which he did not do.

It is the same here. All that the respondent does and in this petition, is to say that the sum is arbitrary. He has failed to show what the correct figure should be. It is true that the respondent mentions the sum of RM10,000.50 which the respondent alleged to have been wrongly deducted. This again is a bare allegation. *Anyway, even if that amount is wrongly claimed (there is no evidence that it is) considering the debt claimed is more than RM4.7m, the balance is still many times over the RM500 minimum provided by law.* In *YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd* [1996] 3 CLJ 51 CA, the Court of Appeal held that even if the notice overstated the amount owing, it is legitimate to look at the circumstances in order to determine the critical issue upon which the application depends, namely whether or not the company is unable to pay its debts.

The respondent has failed to show that there is a *bona fide* dispute as to the amount claimed or that it is able to pay the debt.

In the circumstances, I made the winding up order as well as other consequential orders prayed for. (emphasis added)

[32] Again the case of *Sakuragawa Pump (S) Pte Ltd v. Perkapalan Mesra Sdn Bhd* [2007] 1 LNS 417 HC, was one where judgment had already been obtained. His Lordship Hamid Sultan JC (as he then was) observed and distilled the position of the law as follows at p. 11:

> [11] On the facts of this case, the petitioner cannot be said to be making a claim on a disputed debt. In this case, the petitioner holds a final judgment from a court of competent jurisdiction which till date has not been set aside or there is no credible evidence to show that the respondent had made

prompt attempt to contest the judgment in Singapore or set aside the registration of the said judgment. Generally, creditor's petition for winding up is only presented upon judgment having been obtained. A judgment in default for all purposes can be said to be a final judgment, unless there is an application to set aside the judgment and/or there is an appeal in respect of the application. In *Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343 SC, it was stated that a petition for winding up can be presented based on a judgment in default, even if the default judgment is irregular. The default judgment is good and enforceable until it is set aside. However, it must be emphasised that a default judgment cannot be treated as a final judgment when there is an appeal pending and/or an application for it to be side aside (see *Re Udos ak Riging Ex P Seabanc* [1994] 1 LNS 217 HC) provided the said application is not only made promptly, but the applicant can demonstrate to the court that all attempts to expedite the hearing of the applicant has been made. This is to ensure that the applicant is not attempting to delay the winding up proceedings, the proceedings of which need to be expeditiously dealt with

Pronouncement

[33] Having reviewed the position of the law on the meaning of a "*bona fide* dispute" as to the debt sought to be claimed under s. 218(2)(a) of the Companies Act in a petition grounded on s. 218(1)(e) and whether the presumption of an inability to pay its debt had been rebutted by the respondent, I find that this is a case where there is a *bona fide* dispute on the debt which the petitioner for its non-payment by the respondent sought to wind it up. The respondent has rebutted the statutory presumption of its inability to pay the debt as the debt to begin with is being disputed and on substantial grounds. The petitioner does not therefore stand in the position of a 'creditor' that has the locus to present a winding-up petition against the respondent. In the circumstances I had no hesitation to dismiss the petition with costs of RM5,000 to the respondent. The deposit paid by the petitioner to the official receiver is to be refunded to the petitioner after deducting RM200 being costs to the official receiver.